

STATE OF MICHIGAN
COURT OF APPEALS

LINDA SUE WOLFORD,

Plaintiff-Appellant,

V

PHILLIP ANTHONY PIKARSKI,

Defendant,

and

THUMB HOME REAL VIDEO, LLC,

Defendant-Appellee.

UNPUBLISHED

February 17, 2011

No. 295989

Huron Circuit Court

LC No. 09-004076-NI

Before: MURPHY, C.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting summary disposition in favor of defendant Thumb Home Real Video, LLC (THRV). Because there remains an outstanding question of fact for the jury, we reverse and remand for further proceedings consistent with this opinion.

This case stems from an October 30, 2008, auto accident between plaintiff and defendant Pikarski, which left plaintiff severely injured. Pikarski operated a satellite installation and service business as a d/b/a. THRV was a retailer of satellite television services. Customers who contracted with THRV received DISH network subscriptions along with the relevant equipment and installation of that equipment. THRV had a contract with Pikarski for him to perform their installations in the Huron County area. No contract existed between the customers and Pikarski.

Pursuant to THRV's contract with DISH, DISH sold THRV the satellite equipment which THRV offered to their customers. After installation, THRV would send the customer's subscription contract to DISH and DISH would reimburse THRV the cost of the satellite equipment. At the time of the accident, Pikarski was driving from a home where he had just completed a THRV installation to the THRV office where he planned to drop off signed contracts after which he planned to drive to another THRV installation. He testified that he took a particular route so that he could stop at THRV before going to the next installation. He stated

that he did so because “I’ve been told get the paperwork back as quickly as possible because they need to be able to be able to submit it to the companies for payment, so I try to do that for them.” The crash occurred when Pikarski attempted to pass a semi-truck by crossing the centerline of the road at approximately 55 mph and struck plaintiff’s vehicle traveling in the opposite direction, severely injuring her.

Plaintiff asserts that THRV is liable for his injuries through an agency relationship with Pikarski. The trial court granted summary disposition to THRV finding that there was no question of fact that Pikarski was not an agent of THRV.

Plaintiff now appeals the trial court’s grant of summary disposition on the issue of THRV’s liability. We review de novo a trial court’s decision on a motion for summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). A party is entitled to summary disposition if the evidence, viewed in the light most favorable to the nonmoving party, reveals a lack of any genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the evidence might lead reasonable minds to disagree. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “Courts are liberal in finding a genuine issue of material fact.” *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992).

To determine whether an agency relationship exists, we look to the actual relations of the parties as shown through their agreements and their actions. *St Clair Intermediate Sch Dist v Intermediate Ed Ass’n/MEA*, 458 Mich 540, 557; 581 NW2d 707 (1998), quoting *Saums v Parfet*, 270 Mich 165, 170-171, 258 NW 235 (1935). “[I]n its broadest sense, agency ‘includes every relation in which one person acts for or represents another by his authority.’” *Id.* The characteristic of an agent is that he is a business representative. *Id.* “His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons.” *Id.*, quoting *Saums* at 172. The principal is liable for any acts of the agent done within the scope of the agency. *Caldwell v Cleveland-Cliffs Iron Co*, 111 Mich App 721, 731; 315 NW2d 186 (1981). “It is well settled . . . that the existence and scope of an agency relationship are questions of fact for the jury.” *Whitmore v Fabi*, 155 Mich App 333, 338; 399 NW2d 520 (1986). An agent need not be an employee of his principal. *Lincoln v Fairfield-Nobel*, 76 Mich App 514, 519; 257 NW2d 148 (1977).

We find *Lincoln* instructive in the instant case. This Court found a genuine issue of fact as to whether an agency relationship existed between a company and an independent contractor salesman where the salesman was actively engaged in creating contracts between the company and its customers. *Id.* at 519-520. In the present case, in addition to installing satellite equipment, Pikarski obtained signatures for THRV from the customers on contracts between the customer and their satellite provider. According to THRV’s owner/manager, THRV would advise the customer that the installer would be bringing the contract and that they would have to sign it in order for installation to proceed. Although the customers typically signed an initial contract directly with THRV prior to the equipment installation, THRV’s owner/manager testified that the original contract between THRV and the customer was not binding unless the subscription contract carried by the installer was executed by the customer when presented by the installer:

Q: You talked about the one contract signed at the store. If your installer gets out there and the person says I'm not signing [the subscription] contract, don't install it, is it your position that they still owe you the fees and penalty fee, so forth?

A. No.

* * *

Q: If the customer refuses to sign [the subscription contract carried by the installer] there is no installation, no agreement between your company and that customer, the whole deal is off?

A: Correct.

Similarly, in his testimony, Pikarski agreed that "the signing of the contract by the customer there at the house is really what committed them to pay for this service." Thus, by obtaining execution of binding contracts on behalf of THRV, Pikarski was "bringing about contractual obligations" as discussed in *St Clair Intermediate School Dist*, 458 Mich at 557-558. Indeed, at the time of the accident, Pikarski was delivering signed contracts to THRV after which he planned to perform another installation THRV had scheduled for him.

The dissent argues that Pikarski was not a business representative for THRV because the contractual relationship between THRV and the customer was created before the installation and the contracts Pikarski obtained signatures on were for DISH Network, not THRV. However, this ignores the fact that Pikarski's appearance at the home is to fulfill THRV's contractual obligation to install the equipment. More important, as noted above, THRV takes the position that until the contract brought by the installer is signed, there is no binding agreement between the purchaser and THRV. Pikarski is required by THRV to present the second contract to the homeowner and on THRV's behalf direct the homeowner to sign it if they wish to receive services from THRV. And, as Pikarski testified, if the customer declines to sign the second contract, he is, per THRV direction, to leave the home without conducting the installation. Thus, Pikarski is bringing about and affecting a contractual obligation between THRV (the principal) and its customers, which makes Pikarski a business representative even as the dissent has defined it. Further, the DISH contract signed at the home stated at the top "Retailer Information: (name) JAY CAMERON DBA THUMB HOME REAL VIDEO" and listed the THRV's phone number.

Plaintiff also presented other evidence upon which a trier of fact could find an agency relationship. As a condition of his working with THRV, Pikarski agreed not to perform any non-THRV satellite installations in the Huron County area. In addition, there was testimony that THRV required Pikarski to maintain automobile insurance as a condition of receiving installation jobs from THRV. Also, while disputed, there was testimony that THRV maintained liability

insurance to cover any property damage that occurred during an installation.¹ Furthermore, defendant's owner agreed that his installers would introduce themselves to customers as "from Thumb Home Video." The customer's would pay THRV and Pikarski had no independent contractual arrangement with the customers. Finally, THRV's owner/manager testified that his company typically arranged the scheduling of the installations, including the three installations Pikarski was scheduled to perform on the day in question and the customer was not informed who the installer would be. All of these factors weigh in favor of a finding that Pikarski was, as well appeared to be, a business representative of THRV.

The dissent states that "testimony that if the customer did not sign the DISH Network contract, then THRV would not enforce its contract with the customer, is immaterial to the issue [of agency]." To the contrary, this is evidence of control by THRV over Pikarski. Indeed, if Pikarski were to install the equipment without obtaining the customer's signature, THRV would not pay him. By dictating that the DISH Network agreement must be signed before Pikarski may perform the installation, in addition to scheduling the installations, THRV exercises actual control over Pikarski's services. Even the dissent concedes that THRV exercised *some* control over Pikarski, albeit characterizing it as "very little." Nevertheless, the caselaw on agency does not require that the control element of agency must be satisfied by a showing of complete and total control. Rather, all that must be shown is the right to control "at least at some point, the conduct and actions of his agent." *Persinger v Holst*, 248 Mich App 499, 504-505; 639 NW2d 594 (2001). Thus, because there is evidence of both some control and a business relationship, summary disposition was inappropriate and the question of agency must be left for the jury to determine. *Whitmore*, 155 Mich App at 338; see also *Meretta*, 195 Mich App at 697 ("Where there is a disputed question of agency, any testimony, either direct or inferential, tending to establish agency creates a question of fact for the jury to determine.").

Our colleague's dissent offers well-reasoned arguments regarding the evidence and inferences supporting THRV's position that it did not have an agency relationship with Pikarski. For example, the dissent points out that Pikarski described himself as an "independent contractor. However, "[t]he manner in which the parties designate the relationship is not *controlling*." *Lincoln*, 76 Mich App at 520 (emphasis added). The dissent also observes that THRV exercised little control over the physical installation process and that while THRV provided the satellite dishes, brackets and receivers for Pikarski to install, he used his own tools and was not obligated to follow any established physical installation procedure. While Pikarski's testimony references at least one particular circumstance that would involve him contacting THRV regarding installation details from the customer's home, we agree that his general autonomy in installation technique weighs against a finding of agency.²

¹ For the purposes of deciding whether the trial court erred, we view this disputed assertion in plaintiff's favor. *Quinto*, 451 Mich at 362.

² This involved the use of "pole mount" where there were line of sight problems from the customer's home.

Given these facts, the evidence before us does not necessitate or allow for the conclusion that Pikarski was, as a matter of law, an agent of THRV. However, it also does not necessitate a conclusion as a matter of law that he was not. Rather, there is evidence that can reasonably support either conclusion, such that reasonable minds could differ on the issue. Accordingly, a question of fact exists. *West*, 469 Mich at 183. Consequently, it must be left for the jury to determine whether an agency relationship existed in the instant case. *Whitmore*, 155 Mich App at 338; *Meretta*, 195 Mich App at 697.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy

/s/ Douglas B. Shapiro